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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 AMIE JOHNSON, CHRISTOPHER D.
12 JOHNSTON, MAL BERGMAN and
13 TESS BERGMAN, on behalf of
themselves and all others similarly
situated,

14 Plaintiffs,

15 v.

16 COUNTRYWIDE HOME LOANS, INC.,

17 Defendant.

18 CASE NO. C09-5217BHS

19 ORDER GRANTING IN PART
20 AND DENYING IN PART
21 PLAINTIFFS' MOTION FOR
22 LEAVE TO FILE SECOND
23 AMENDED COMPLAINT AND
24 GRANTING DEFENDANT'S
MOTION TO DISMISS

25 This matter comes before the Court on Defendant's Motion to Dismiss First
26 Amended Complaint (Dkt. 39) and Plaintiffs' Motion for Leave to File Second Amended
27 Complaint (Dkt. 42). The Court has considered the pleadings filed in support of and in
opposition to the motions and the remainder of the file and hereby grants in part and
denies in part Plaintiffs' motion and grants Defendant's motion for the reasons stated
herein.

28 **I. PROCEDURAL HISTORY**

29 On April 16, 2009, Plaintiffs Amie Johnson, Christopher D. Johnston, Mal
30 Bergman and Tess Bergman filed a Class Action Complaint for Damages/Injunctive
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1 Relief alleging that Defendant Countrywide Home Loans, Inc., violated the Washington
2 Consumer Loan Act (“CLA”), RCW 34.04, *et seq.*, and the Washington Consumer
3 Protection Act (“CPA”), RCW 19.86, *et seq.* Dkt. 1 (“Complaint”).

4 On June 15, 2009, Defendant filed a Motion to Dismiss. Dkt. 23. On September
5 16, 2009, the Court granted in part and denied in part Defendant’s motion. Dkt. 35. The
6 Court granted Defendant’s motion in part as follows:

7 Defendant argues that WAC 208-620-560 applies only to junior
8 liens. Dkt. 23 at 9. Plaintiffs counter that the version of the code that was
9 in effect during the origination of Plaintiffs loans, 2006 and 2007, did not
10 limit the prohibited practices to junior liens. Dkt. 33 at 3-4. But, under
11 Washington law, an amendatory act “constitutes a repeal of the amended act
12 to the extent the two acts are inconsistent.” *See Cazzanigi v. General Elec. Credit Corp.*, 132 Wn.2d 433, 442-443 (1997) (citing *Seattle-King County Council of Camp Fire v. State*, 105 Wn.2d 55, 63, 711 P.2d 300 (1985)).
13 The current version of WAC 208-620-560 is limited to junior liens. *See*
14 WAC 208-620-560 (“What restrictions are there for charging fees on junior
lien loans other than the loan origination fee”). The Court finds that
15 this version controls the disposition of this action. Therefore, the Court
16 grants Defendant’s motion on this issue because Plaintiffs have failed to
17 show that the loans in question are governed by WAC 208-620-560.
18

19 Dkt. 35 at 6.

20 The Court also granted Defendant’s motion with respect to Plaintiffs’ CPA claim.
21 The Court found that Plaintiffs had stated a valid legal theory but had failed to plead
22 sufficient facts to support that theory. *Id.* at 6-7. The Court gave Plaintiffs 30 days to file
23 an amended complaint that was “consistent with [the Court’s] order” *Id.* at 7.

24 On October 16, 2009, Plaintiffs filed a First Amended Complaint. Dkt. 36.
25 Plaintiffs added allegations to their CLA claim (*see id.* ¶¶ 6.6, 6.7, 6.9, 6.11, 6.12, and
26 6.13), added allegations and case citations to their CPA claim (*see id.* ¶¶ 6.17-6.23), and
27 added a breach of contract claim (*see id.* 6.24-6.29).

28 On November 12, 2009, Defendant filed a Motion to Dismiss First Amended
Complaint. Dkt. 39. On December 11, 2009, Plaintiffs responded and filed a Motion for
Leave to File Second Amended Complaint (Dkt. 42) and submitted the proposed Second
Amended Complaint (Dkt. 42-2 (“Proposed Complaint”)). On December 23, Defendant

1 replied to its motion (Dkt. 43) and responded to Plaintiffs' motion (Dkt. 44). On
2 December 30, 2009, Plaintiffs replied to their motion. Dkt. 45.

3 **II. FACTUAL BACKGROUND**

4 Plaintiffs' claims arise from two mortgage loans that they obtained from
5 Defendant. The first loan was obtained by Plaintiffs Ms. Johnson and Mr. Johnston
6 (Complaint ¶¶ 4.2-4.7) and the second loan was obtained by Plaintiffs Mr. and Mrs.
7 Bergman (Complaint ¶¶ 4.8-4.12).

8 **A. Ms. Johnson and Mr. Johnston's Loan**

9 On January 20, 2007, Ms. Johnson and Mr. Johnston entered into a real estate
10 purchase agreement to acquire real property located in Spanaway, Washington.
11 Complaint ¶ 4.3. They described this property as their "new home," *id.*, and stated that
12 they have resided at that property at all times relevant to the Complaint. *Id.* ¶ 3.1. On
13 June 19, 2007, they applied for a residential loan from Defendant. *Id.* ¶ 4.4. On July 25,
14 2007, the mortgage loan closed after Ms. Johnson and Mr. Johnston executed a
15 promissory note in favor of Defendant in the amount of \$271,667, secured by a deed of
16 trust on the Spanaway property. *Id.* ¶ 4.5. Defendant notes that the "Complaint does not
17 allege that a junior lien secured Johnson and Johnston's Defendant loan or that any other,
18 prior liens encumbered the property." Dkt. 28 at 3.

19 In this action, Ms. Johnson and Mr. Johnston challenge a "Loan Discount Fee" of
20 1.5% of the loan principal. Proposed Complaint, ¶¶ 4.5-4.7.

21 **B. The Bergmans' Loan**

22 In the spring of 2006, the Bergmans applied for a residential mortgage loan from
23 Defendant. Complaint ¶ 4.8. The Bergmans intended to use the loan's proceeds to
24 refinance an existing construction loan "for a home being built for the Bergmans." *Id.*
25 On May 30, 2006, the Bergmans executed a note in favor of Defendant in the amount of
26 \$389,410.22. *Id.* ¶ 4.9. To secure the note, the Bergmans also granted a deed of trust in
27 favor of Defendant as to certain real property located in Graham, Washington. *Id.* ¶¶ 3.2,

1 4.9. Defendant notes that the “Complaint does not state that a junior lien secured the
2 Bergmans’ loan or that any other, prior liens encumbered the property.” Dkt. 28 at 4.

3 The Bergmans challenge a “Jumbo Fee” of \$19,688.95 (Proposed Complaint, ¶¶
4 4.10-4.12) and a “Loan Discount” fee of \$5,733.75 (*id.* ¶¶ 4.13-4.15).

5 **III. DISCUSSION**

6 As a threshold matter, Plaintiffs have essentially filed a motion for reconsideration
7 of the Court prior order and have failed to stay within the limits of the specific leave that
8 they were granted to amend their complaint. First, Plaintiffs must file a motion for
9 reconsideration within fourteen days after the order to which it relates is filed. Local Rule
10 CR 7(h)(2). Plaintiffs failed to abide by this procedural rule. Moreover, Plaintiffs
11 essentially ask the Court to overrule the Washington State Supreme Court on an issue of
12 state law because of an “overwhelming ‘sea-change’ in the jurisprudence of
13 retroactivity.” Dkt. 42 at 14-17. The arguments for Plaintiffs’ request are unpersuasive
14 and, therefore, the Court denies Plaintiffs’ implicit motion for reconsideration.

15 Second, in lieu of dismissing Plaintiffs’ CPA claim, the Court *sua sponte* granted
16 Plaintiffs leave to amend their complaint to add factual allegations in support of their
17 CPA claim. Dkt. 35. Completely ignoring this order, Plaintiffs added various allegations
18 to both their CLA claim and their CPA claim, and added an entirely new breach of
19 contract claim. Dkt. 36 at 10-15. While the Court is inclined to strike the First Amended
20 Complaint and instruct Plaintiffs to comply with the previous order, the parties have fully
21 briefed both a motion for leave to amend and a motion to dismiss. To “secure the just,
22 speedy, and inexpensive determination” of this action, the Court will strike the First
23 Amended Complaint and consider the parties’ motions as applied to the Proposed
24 Complaint.

25 **A. Plaintiffs’ Motion for Leave to Amend**

26 Once a complaint has been answered, a party may amend it by consent of the
27 opposing party or with leave of court. Fed. R. Civ. P. 15(a)(2). Although leave should be
28

1 freely given when justice so requires, courts should consider the following factors: “(1)
2 bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment;
3 and (5) whether plaintiff has previously amended his complaint.” *Allen v. City of Beverly*
4 *Hills*, 911 F.2d 367, 373 (9th Cir. 1990). A proposed amendment is futile “if no set of
5 facts can be proved under the amendment to the pleadings that would constitute a valid
6 and sufficient claim or defense.” *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th
7 Cir. 1988). The Court will apply these considerations to Plaintiffs’ proposed
8 amendments.

9 **1. Breach of Contract**

10 In the Proposed Complaint, Plaintiffs assert a breach of contract claim. Proposed
11 Complaint, ¶¶ 6.24-6.29. The claim is based on “implicit terms” in the contracts of the
12 “covenant of good faith and fair dealing.” *See id.* ¶¶ 6.25-6.26. “[T]he duty of good faith
13 does not . . . inject substantive terms into the parties’ contract.” *Badgett v. Security State*
14 *Bank*, 116 Wn.2d 563, 569 (1991) (internal quotations omitted). A party cannot “expand
15 the existing duty of good faith to create obligations on the parties in addition to those
16 contained in the contract.” *Id.* at 570.

17 In this case, Plaintiffs’ breach of contract claim is legally deficient because it is
18 based on the proposition that the duty of good faith and fair dealing is a substantive term
19 of their contracts. Therefore, the Court denies without prejudice Plaintiffs’ motion for
20 leave to add a breach of contract claim because, as alleged, it would be futile.

21 **2. CLA**

22 Plaintiffs allege that Defendant is subject to the provisions of the CLA. Proposed
23 Complaint, ¶ 6.1. Plaintiffs also allege that Defendant violated the CLA by charging
24 various fees that are specifically prohibited by WAC 208-660-500. *Id.*, ¶¶ 6.7, 6.9, 6.11,
25 6.13, and 6.14. Defendant counters that if it is doing business under the CLA, then it is
26 not subject to WAC 208-660-500 because that administrative code was promulgated

1 pursuant to the Mortgage Broker Practices Act, RCW 19.146, *et seq.* (“MBPA”). Dkt. 39
2 at 10-11. The Court agrees.

3 In particular, the MBPA states that “any person doing business under the consumer
4 loan act is exempt from this chapter” for any loans “conducted under the authority and
5 coverage of the consumer loan act.” RCW 19.146.020(1)(b); *see also* WAC
6 208-660-008(3) (“If you are licensed under the Consumer Loan Act, . . . residential
7 mortgage loans are exempt from the Mortgage Broker Practices Act.”).

8 Therefore, Plaintiffs are denied leave to amend and add these claims because, as
9 alleged, they would be futile.

10 **3. Fraudulent Concealment**

11 In their motion for leave to amend, Plaintiffs seek leave to add a cause of action
12 for fraudulent concealment. Dkt. 42 at 12-13. Plaintiffs argue that they “believe that a
13 cause of action for fraudulent concealment” may be asserted against Defendants. *Id.* at
14 12. However, Plaintiffs have failed to include this cause of action in their Proposed
15 Complaint. At this time, without specific supporting factual allegations, Plaintiffs’ mere
16 belief as to their cause of action is futile. Therefore, the Court denies without prejudice
17 Plaintiffs’ motion for leave to amend on this issue.

18 **4. Conclusion**

19 The Court denies Plaintiffs’ motion for leave to amend as to the proposed breach
20 of contract claim, the fraudulent concealment belief, and the alleged violations of WAC
21 208-660-500. The remainder of Plaintiffs’ Proposed Complaint is based on allegedly
22 unearned “Loan Discount Fees” and “Jumbo Fees.” *See, e.g.*, Proposed Complaint, ¶¶
23 6.4-6.5. Therefore, the Court grants leave to amend the remainder of the Proposed
24 Complaint and will turn to Defendant’s motion to dismiss Plaintiffs’ CLA and CPA
25 claims.

1 **B. Defendant's Motion to Dismiss**

2 **1. Standard**

3 Fed. R. Civ. P. 12(b)(6) motions to dismiss may be based on either the lack of a
4 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
5 theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990).
6 Material allegations are taken as admitted and the complaint is construed in the plaintiff's
7 favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983). “[A] plaintiff’s obligation to
8 provide the grounds of his entitlement to relief requires more than labels and conclusions,
9 and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic*
10 *Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (internal citations omitted). “Factual
11 allegations must be enough to raise a right to relief above the speculative level, on the
12 assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Id.*
13 at 1965. A plaintiff must allege “enough facts to state a claim to relief that is plausible on
14 its face.” *Id.* at 1974.

15 **2. Plaintiffs' Claims**

16 As stated above, Plaintiffs allege that Defendant charged them unearned “Loan
17 Discount Fees” and “Jumbo Fees.” *See, e.g.*, Proposed Complaint, ¶¶ 6.4-6.5. These
18 factual allegations of unearned fees are the only basis of Plaintiffs’ CLA claim and CPA
19 claim. The Court will address each claim.

20 **a. CLA**

21 Plaintiffs’ remaining CLA claim is as follows:

22 6.6 By charging Plaintiffs and Class Members these unearned
23 fees, Countrywide directly or indirectly employed a scheme, device or
artifice to defraud or mislead these borrowers in violation of RCW
31.04.027(1).

24 ***

25 6.8 By charging Plaintiffs and Class Members these unearned
26 fees, Countrywide directly or indirectly engaged unfair or deceptive
practices toward these borrowers in violation of RCW 31.04.027(2).

27 ***

28 6.10 By charging Plaintiffs and Class Members these unearned
fees, Countrywide obtained property by fraud or misrepresentation from
these borrowers in violation of RCW 31.04.027(3).

* * *

6.12 By charging Plaintiffs and Class Members these unearned fees, Countrywide made false and deceptive statements or representations with regard to the rates, points or other financing terms or conditions for residential mortgage loans to these borrowers in violation of RCW 31.04.027(7).

Proposed Complaint.

First, Defendant argues that Plaintiffs have failed to make any factual allegation that Defendant (1) “directly or indirectly employed a scheme, device or artifice to defraud or mislead” customers; (2) “obtained property by fraud or misrepresentation;” or (3) “made false and deceptive statements or representations.” Dkt. 39 at 11-12. The Court agrees. Plaintiffs essentially allege that they were defrauded or Defendant made misrepresentations because Defendant “cannot show” that the charging of either the loan discount fee or jumbo fee resulted in any benefit to Plaintiffs. That allegation is not plausible. Moreover, Plaintiffs’ alleged entitlement to relief is nothing “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action.” *Twombly*, 127 S. Ct. at 1965. Therefore, the Court grants Defendant’s motion to dismiss on paragraphs 6.6, 6.10, and 6.12 of the Proposed Complaint.

Second, Defendant argues that Plaintiffs have failed to make any factual allegation of an unfair and or deceptive practice. Dkt. 39 at 12-13. The Court agrees. With regard to the loan discount fee that Defendant disclosed and Plaintiffs paid, Plaintiffs have failed to allege facts to state a plausible claim that the fee was either unfair or deceptive. Plaintiffs merely conclude that Defendant “cannot show that the charging of these discount points . . . resulted in a reduction of the interest rate charged . . .” or, in the alternative, that the loan discount received was not “commensurate with the amount of the discount fee charged . . .” Proposed Complaint, ¶¶ 4.6, 4.7. These conclusions do not establish an “unfair or deceptive” act.

With regard to the jumbo fee that Plaintiffs paid on an allegedly non-jumbo loan, Defendant argues that the loan was a jumbo loan. Dkt. 44 at 8-10. Plaintiffs failed to respond to this argument and offer no allegation to the contrary. In fact, Plaintiffs even

allege that the Bergmans' loan was a jumbo loan. Proposed Complaint, n. 4 ("the Deed of Trust states that it secures \$417,000 in debt."). It can hardly be an unfair or deceptive practice to disclose and charge a jumbo fee on a jumbo loan.

Therefore, the Court grants Defendant's motion to dismiss Plaintiffs' CLA claim.

3. CPA

Plaintiffs' remaining CPA claim rests on the following allegations:

6.20 Countrywide's misconduct alleged in the foregoing paragraphs of this Complaint in which it charged Plaintiffs and Class Members unearned fees on their residential home loans constitutes an unfair act or practice within the meaning of the CPA.

6.21 Countrywide's misconduct alleged in the foregoing paragraphs of this Complaint in which it charged Plaintiffs and Class Members unearned fees on their residential home loans constitutes a deceptive act or practice within the meaning of the CPA.

Proposed Complaint.

The Court has already concluded that Plaintiffs have failed to allege an unfair or deceptive act based on the loan discount fee and the jumbo fee. Therefore, the Court also grants Defendant's motion to dismiss Plaintiffs' CPA claim.

IV. ORDER

Therefore, it is hereby

ORDERED that Plaintiffs' Motion for Leave to File Second Amended Complaint (Dkt. 42) is **GRANTED in part** and **DENIED in part** as stated herein and Defendant's Motion to Dismiss First Amended Complaint (Dkt. 39) is **GRANTED**.

DATED this 1st day of February, 2010.



BENJAMIN H. SETTLE
United States District Judge